

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARK WHITE,

Plaintiff,

Case No. 23-10592

v.

HON. DENISE PAGE HOOD

MICHIGAN DEPARTMENT OF
CORRECTIONS, et al.,

Defendants.

_____/

ORDER ACCEPTING AND ADOPTING
REPORT AND RECOMMENDATION (ECF NO. 24),
MOOTING MOTIONS TO AMEND and TO TERMINATE COUNSEL,
PROCEED PRO SE, AND VOLUNTARY DISMISSAL OF MOTIONS
AND APPEALS (ECF Nos. 13, 25), DENYING MOTION FOR
RELIEF FROM JUDGMENT (ECF No. 20)
AND
DISMISSING ACTION WITHOUT PREJUDICE

This matter is before the Court on Magistrate Judge Elizabeth A. Stafford's October 4, 2023 Report and Recommendation to Dismiss Defendants and to Deny Motions as Moot. (ECF No. 24) No timely Objections were filed to the Report and Recommendation. However, on November 3, 2023, Plaintiff filed a Motion to Terminate Counsel and Proceed Pro Se; and Plaintiff Voluntary Dismissal of all Motions and Appeals Pending on November 3, 2023. (ECF No. 25)

The standard of review by the district court when examining a Report

and Recommendation is set forth in 28 U.S.C. § 636. This Court “shall make a *de novo* determination of those portions of the report or the specified proposed findings or recommendations to which an objection is made.” 28 U.S.C. § 636(B)(1)(c). The Court “may accept, reject or modify, in whole or in part, the findings or recommendations made by the Magistrate.” *Id.* In order to preserve the right to appeal the Magistrate Judge’s recommendation, a party must file objections to the Report and Recommendation within fourteen (14) days of service of the Report and Recommendation. Fed. R. Civ. P. 72(b)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of Health and Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

After review of the October 4, 2023 Report and Recommendation, the Court finds that the Magistrate Judge’s conclusions are correct. The Court further finds that Plaintiff failed to serve any Defendant as required under Rule 4(m) of the Rules of Civil Procedure. The Magistrate Judge previously noted that Plaintiff failed to timely serve Defendants and ordered Plaintiff to show cause why the Defendants should not be dismissed

because they were not served as required by Rule 4(m). No response was filed to the Magistrate Judge's show cause order, and the Magistrate Judge thereafter issued the October 4, 2023 Report and Recommendation noted above.

Although the Motion for Relief from Judgment may be moot because of the dismissal of the action, the Court addresses the motion. Motions for reconsideration under E.D. Mich. LR 7.1(h) and Rule 60(b)(1) of the Rules of Civil Procedure state that such motions may be brought if the court made a mistake in an order. Plaintiff asserts that the Court made a mistake in dismissing the Michigan Department of Corrections because he was only seeking injunctive relief for ongoing violations. However, the Supreme Court has specified that the exception of *Ex Parte Young*, 209 US. 123 (1908) to Eleventh Amendment immunity does not apply to a state agency. *Taylor v. University of Michigan*, Case No. 17-11473, 2018 WL 1322395 at *4-*5 (E.D. Mich. Feb. 23, 2018). Because the MDOC is an instrumentality of the state, the MDOC is protected by the Eleventh Amendment from all claims, regardless of the nature of the relief sought. *Id.* The Court did not make a mistake in dismissing the MDOC from this action based on Eleventh Amendment immunity.

Plaintiff's subsequent Motion to Terminate Counsel and Proceed Pro Se and for Voluntary Dismissal of all Motions and Appeals, filed after the Report and Recommendation was issued and beyond the time to timely file Objections to the Report and Recommendation, does preclude the Court from accepting the Magistrate Judge's recommendation to dismiss Defendants. It still remains that Defendants were not timely served with the Complaint and Summons as required by Rule 4(m). In any event, the motion is moot in light of the Court's acceptance of the Report and Recommendation. The Court accepts the Magistrate Judge's findings that Defendants were not served with the Complaint and Summons as required by Rule 4(m).

Accordingly,

IT IS ORDERED that Magistrate Judge Elizabeth A. Stafford's Report and Recommendation (**ECF No. 24**) is **ACCEPTED AND ADOPTED** as this Court's findings of fact and conclusions of law.

IT IS FURTHER ORDERED that Plaintiff's Motion to Amend-Supplement the Complaint (**ECF No. 13**) and the Motion to Terminate Counsel and Proceed Pro Se, and Voluntary Dismissal of all Motions and Appeals Pending (**ECF No. 25**) are now rendered **MOOT**.

IT IS FURTHER ORDERED that the Motion for Relief from Judgment
(ECF No. 20) is **DENIED**.

IT IS FURTHER ORDERED that this action is **DISMISSED** without
prejudice for failure to serve under Rule 4(m) of the Rules of Civil
Procedure and designated as **CLOSED** on the Court's docket.

s/Denise Page Hood
Denise Page Hood
United States District Judge

Dated: November 28, 2023